88-1459

No.

Supreme Court, U.S.
FILED
FEB 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMBROSE DAIGLE,

Petitioner,

v.

GULF STATES UTILITY COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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27 pp

QUESTIONS PRESENTED

I.

Is a Defendant "Estopped" to urge the failure to arbitrate, and therefore the six (6) months Statute of Limitations, as a bar to Plaintiff's action when said Defendant successfully obtained denial of the grievance procedure through false and misleading statements?

II.

Where an employee accepts termination of employment as final, and merely seeks damages, is there a necessity to pursue Grievance and Arbitration?

CERTIFICATE OF INTERESTED PARTIES

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuits:

(1) Ambrose Daigle, Petitioner (Daigle)

(2) Gulf States Utility Company, Respondent, (GSU).

(3) Lester R. Buzbee, III, attorney for Ambrose Daigle.

(4) Darrell McAlexander, attorney for Ambrose Daigle.

(5) Robert J. Hambright, attorney for Gulf States Utility Company.

(6) William E. Heaner, Jr., attorney for Gulf States Utility Company.

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IN THE

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No._____

AMBROSE DAIGLE,

Petitioner,

v.

GULF STATES UTILITY COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Ambrose Daigle, the Petitioner, prays that a Writ of Certiorari issue to review the Judgement of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 20, 1988, and Rehearing denied on November 17, 1988.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit was not reported and is printed in Appendix A, *infra*, page 1a. The Judgement of the United States District Court for the Eastern District of Texas, Beaumont Division, is printed in Appendix A, *infra*, page 6a.

JURISDICTION

The Judgement of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page 1a) was entered on October 20, 1988. A Motion for Rehearing was filed and overruled on November 17, 1988. The Jurisdiction of the Supreme Court is involved pursuant to 28 USCA Section 1254(1).

STATUTES INVOLVED

29 USCA 160(b) Prevention of unfair labor practices--Powers of Board generally (Appendix B, infra. page 13a)

STATEMENT OF THE CASE

Petitioner is suing *Gulf States Utilities Company* for breach of contract, wrongful discharge, and seeks damages. The U.S. Magistrate, on a Motion to Dismiss, dismissed Plaintiff's case as barred by the six (6) month Statute of Limitations.

Petitioner originally filed suit naming *Gulf States Utilities Company* the Union and The Texas Employment Commision. The case was dismissed, barred by the six (6) month Statute of Limitations as set forth in *DelCostello vs International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2286, 76 L.Ed.2d 476 (1983).* The Fifth Circuit affirmed in part and reversed in part and remanded for a determination of whether Petitioner was required to go through grievance and arbitration, and if so, are such procedures final and binding on the parties?

On remand the trial court, pursuant to Rule 12(b) F.R.C.P., dismissed Petitioner's case as barred by the six (6) Statute of Limitations for failure to go through the grievance and arbitration procedure. The Fifth Circuit upheld the trial court's ruling.

THE EVIDENCE:

On October 12, 1982, Petitioner was discharged after

31 1/2 years from *Gulf States Utility Company*. On October 17, 1982, though not a member, Petitioner requested that the *International Brotherhood of Electrical Workers* (hereinafter referred to as IBEW), Local 2286, file a grievance on his behalf. On or about October 29, 1982, Petitioner filed his "charge" with the national Labor Relations Board (hereinafter referred to as *NLRB*).

Respondent, through the offices of false affidavits and misstatement, know to be false, obtained a refusal by the NLRB on May 23, 1983 to file a complaint. By the same or similar false and misleading statements, on November 19, 1982, obtained the refusal by the IBEW to file a grievance on behalf of Petitioner.

THE RULINGS BELOW:

In 1985 the District Court granted Respondent's F.R.C.P. Rule 12 Motion and dismissed Petitioner's complaint. The Fifth Circuit reversed in part and remanded in part for determination of whether or not grievance and arbitration were required and if so, whether or not they were binding.

In 1987 the District Court again granted Respondent's F.R.C.P. Rule 12 Motion and dismissed Petitioner's complaint. The Fifth Circuit held that this suit is a "classic hybrid Sec. 301 action" and the six-month statute of limitations applied and affirmed the Judgment of the District Court. The Fifth Circuit denied the Motion for Rehearing without comment.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to determine whether or not a respondent may be estopped to rely on the six-month statute of limitation as established in *DelCostello (supra)*.

The issue in this cause is whether or not the Respondent is estopped from alleging the Collective Bargaining Agreement, and therefore the six-month statute of limitation, as a bar to

Petitioner's claim. The Respondent is also estopped from alleging such agreement was mandatory or binding. As here, where a defendant actively sought the denial of the grievance procedure through misstatements, willful and known falsehoods, to induce the union, to refuse to file both Grievance and Arbitration, estoppel is mandated. The Respondent's also, actively sought the denial of the issuance of the complaint by the NLRB through false and untrue statements. Respondent's Plant Supervisor, Jimmy Smith by affidavit stated, "...I knew that Daigle carried a knife..."(TR361); However, in Smith's deposition, Page 20, line 20, he admits he never saw Daigle with a lethal weapon. He further swore, "...Daigle reported...his car tires had been cut..." "...Daigle said he knew who had did it but that he would not tell me, that he would take care of it himself." (TR363)

However in his deposition at pages 41-43, Smith admitted that Daigle in fact requested no action be taken that, "he didn't want to find out who did it and he thought that the person that did it probably had a family and he wanted to leave things alone. He never made any statement that he would take care of it himself or anything like that". He further swore, "On April 26, 1982, Michael Page, told his shift supervisor that Daigle said he was going to get Ed Steward, a union steward, out the gate and cut him up over something Steward has said about him. I had noticed an increase in the type of conduct by Daigle" (TR363)). Again in his deposition at pages 21-23, Smith admitted that in reality that it was Daigle who was being attacked, not Steward as he alleged. In fact, the supervisor on the spot stated, "Ambrose was catching hell and didn't say anything." In providing the Union the discretion to supervise the grievance machinery and to invoke arbitration, it was assumed that similar complaints would be treated consistently. Therefore, the settlement process furthers the interest of the Union as statutory agent and Co-author of the bargaining agreement in representing employees in enforcement of the agreement. *Vaca vs Sipes, 386 U.S. 171, 17 L.Ed.2d 842 (1967).* The thrust of labor law is not, however, the protection of the Union or the employer, but rather the protection of the employee, and a decision that would operate to the disadvantage of the employee, at minimum, to be avoided. *Mosler Steel Co. vs NLRB, 568 F.2d 436* (C.A. 5, Tex.

1978). Although Congress put its blessing on private dispute settlement arrangements provided in collective bargaining agreements, it was anticipated that the contractual machinery would operate with some minimum levels of integrity. *Hines vs Anchor Motor Freight, Inc., 424 U.S. 554, 47 L.Ed.2d 231 (1976)*

Mr. Baker, Respondent's Manager of Industrial Relations, states in his affidavit that Daigle was indicted for threatening an individual with a knife and was indicted for murder, neither happening on the job, but to show, "Daigle's propensity for violence" (TR 357, 358). At page 37 & 38 of Smith's deposition he admitted that they knew Daigle had been found not guilty on all occasions.

Mr. Baker's letter to the Union (TR 353 & 354) states Daigle was counseled about threats to kill Ed Steward or Joe Hoell. However company records of investigation of the incident shows that Daigle was the victim of threats, not the other way around, (Smith's Deposition Page 21-23), and that Defendant knew of this.

Mr. Baker, in his letter to the Union, (TR 355), states that Mr. Daigle's behavior continued to deteriorate. Also in his second letter to the Union, (TR 354), and in his affidavit to the NLRB, (TR 359), he indicated these claims were only highlights and that there were other "documented" incidents. However, in his deposition, page 42, Baker testified there were only three (3) disciplinary actions against Daigle in thirty-one (31) years of employment. Further, Smith in his deposition testified, (P. 29), that there were no complaints against Daigle in 1981 and in fact, he was even offered a promotion.

To preserve justice for the individual, our Courts have constantly maintained that where an employer has actively sought the denial of grievance procedures through misstatements or fraud, the application of the doctrine of estoppel is mandated. *Smith vs Pittsburgh Cage and Supply Co., 464 F.2d 870 (C.A. PA. 1972); Jackson vs Southern PAC. Transp. Co., 533 F.Supp 276 (D.C. Tex 1982); also see: McBride vs Beaumont City Lions, Inc., 356S.W. 2d 395* (Tx. Civ. App.-

Beaumont, 1962 dism). This theory of law has been applied to both employer and union where employees were misled. *Schultz vs Owens Illinois Inc., 696 F.2d 505 (C.A. 7th 1982).* Also, where the employer made misstatements to the employee. *Day vs United Auto, Aerospace and Agr. Implement Workers of America, Local 36 of UAW, 466 F.2d 83 (C.A. 6th 1972).* Such conduct by an employer is comparable to a refusal to abide by the contract which should also estop the employer. *Boone vs Armstrong Cork Co., 384 F.2d 285, (C.A. 5th 1967).*

The maxim that no man may take advantage of his own wrong is applied in many diverse classes of cases by both law and equity courts. It is frequently employed to bar inequitable reliance on Statutes of Limitations. *Glus vs Brooklyn Eastern District Terminal, 359 U.S. 231; 3 L.Ed2d 770, (1959); Learning Works, Inc. vs The Learning Annex, Inc. 830 F.2d 541 (C.A. 4th 1987);*

As this case was decided on a Rule 12 Motion, all fact questions should have been resolved in Petitioner's favor, and it has been broadly held that estoppel, or the existence thereof, is a fact question. 31 C.J.S. Estoppel Sec. 163.

The Respondent, by, its own actions, is estopped to plead the grievance and arbitration portion of the contract. Therefore, Petitioner's cause is not time barred and should proceed to a trial on the merits on these issues of fact as stated above.

II.

Certiorari should be granted in order to determine whether or not an employee may proceed by action directly against the employer when the union, in good faith, but mistakenly, refuses to process the grievance and arbitration is mandatory when the employees seeks only damages and not re-employment.

Where the employee is required to proceed through the Union, and the Union refuses to process his claim for wrongful discharge, he may proceed by action directly against the employer. The Contract in question required the employee to go through the Union, Article VI Sect. 9; and Article VII Sect.

3 (TR 333). Such failure by the Union will not deprive the employee of his right to resort to the Courts on any theory that he has failed to exhaust his Contract remedies. The Courts should be open to an individual employee to assert a common law action for damages when his alternative is to resort to grievance proceeding before arbiters already combined against him. *Woodward Iron Company vs Frisco Transp. Co., 626 F.2D 55 (C.A. 8th 1980); Gilotrap vs Mitchell Bros. Truck Lines, 529 P.2d 370 (OR, 1974 Cert. Den. 96 S.Ct 2415, 421 U.S. 1011, 44 L.Ed 2d 679).*

An employee who makes claim against an employer alleging wrongful termination, is not required to exhaust grievance remedies where the union has the sole power to invoke such procedures and wrongfully or mistakenly, refuses to process or perfunctorily handles the grievance, or where resort to such procedures would be futile or where the employer repudiates the grievance procedures. *Carbarga Cruz vs Fundacion Educative Ana G. Mendez, Inc., 822 F.2d 188 (C.A. 1st 1987).*

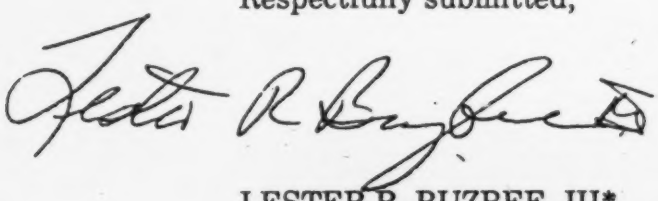
Further, where an employee sues his employers for wrongful discharge, seeks damages and accepts the termination, there is no necessity of pursuing grievance and/or arbitration. Where there is alleged a wrongful termination and there is no evidence that the employee's Union was guilty of unfair representation, the applicable Statute of Limitations is that provided by state law rather than the six-month limitation period provided for a hybrid claim. *Carbarga Cruz vs Fundacion Educative Ana G. Mendez, Inc. (supra).*

Therefore, with the facts of this case, the Petitioner's cause of action should not be bound by the six-month Statute of Limitation and grievance and arbitration should not be required.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,



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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-6252
Summary Calendar

AMBROSE DAIGLE,
Plaintiff-Appellant,

v.

GULF STATES UTILITIES COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(B-83-00704-CA)

(October 20, 1988)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.
PER CURIAM:*

Ambrose Daigle appeals the district court's dismissal of his claim under S 301 of the Labor-Management Relations Act of 1947

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

for failure to comply with the six-months statute of limitations applicable to hybrid S 301/duty of fair representation actions. Finding that the grievance procedures under the governing collective bargaining agreement were mandatory and binding, thereby making the suit a "classic hybrid S 301" action, we affirm.

I.

Ambrose Daigle was discharged from his employment with Gulf States Utilities Company (Gulf States) on October 12, 1982, for violation of a work rule. The International Brotherhood of Electrical Workers (IBEW), which represented Daigle's collective bargaining unit, declined to file a grievance on his behalf with regard to the discharge. Daigle received notice of this decision on November 19, 1982. On August 8, 1983, Daigle filed suit in federal district court against Gulf States and the IBEW. He alleged that his discharge violated the terms of the collective bargaining agreement and that the union had breached its duty of fair representation by not pursuing grievance procedures. The magistrate, who tried the action by agreement, dismissed the claims, since admittedly the complaint was filed more than six months after Daigle was notified that the IBEW would not file a grievance.

A panel of this court affirmed the dismissal in part and remanded the action for a determination of whether the dispute resolution procedures outlined in the collective bargaining agreement were mandatory and binding. *Daigle v. Gulf State Utilities Co., 794 F.2d 974 (5th Cir. 1986).* Remand was necessary because the collective bargaining agreement was not part of the record on appeal. On remand, the magistrate ruled that the grievance procedures provided by that agreement were mandatory, and again dismissed the complaint as time-barred. We affirm.

II.

Section 301 of the Labor-Management Relations Act of 1947 places within a district court's jurisdiction a cause of action by an employee against an employer for breach of a

collectvely bargained employment contract. Jurisdiction of a related action against the union for failure to adequately represent a claimant is implied in the statutory framework. If the grievance and arbitration procedure provided to an employee in the collective bargaining agreement is simply an alternative method of dispute resolution, the employee may bring an action against the employer for breach of the employment contract pursuant to S 301. In such a contact action, the state statute of limitations for contract claims is applicable.

If, on the other hand, the grievance procedures are mandatory and binding, the employee must exhaust those procedures before bringing an action against his employer. If grievance procedures are mandatory, the employee must prove that the union violated its implied statutory duty of fair representation in order to maintain the action. If such proof is not made, the employee is bound by the results of the grievance procedures. The survival of the breach of contract claim thus depends upon the viability of the claim against the union, and the two actions are "inextricably interdependent." *United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981).* Such a suit is a "classic hybrid S 301 action," and the six-month statute of limitations made applicable to fair representation actions against the union by *Delcostello v. International Brotherhood of Teamster, 462 U.S. 151, 169, 103 S.Ct. 2281, 2293, 76 L.Ed.2d 476 (1983),* controls both claims. Without question, the present action against IBEW is time-barred in this case. Therefore, if the grievance procedure was Daigle's final and exclusive remedy, his action for breach of contract against Gulf States was also properly dismissed.

III.

Daigle maintains that the dispute resolution procedures in the collective bargaining agreement are optional with the parties. The magistrate found, however, that they were the mandatory and exclusive steps for handling complaints such as Daigle's. We agree.

Article VI, S 1 of the collective bargaining agreement defines "grievance" as "any dispute that may arise between

one or more employees or the Union and Employer involving the proper application of this Agreement." Under S 2, "all such grievances must be presented and processed soley in accordance with" the three step procedure provided. Any grievance not so presented "will be deemed to no longer exist." Under this language the parties are not free to choose between the formal grievance procedures and the pursuit of an action in court.

If a dispute is not settled in the early stages of the grievance procedures, the agreement provides for submission of the dispute to an arbitrator whose decision shall be binding. Daigle contends that the arbitration is optional, and is binding only if requested by one or both parties. He relies on the language of Article VII, S 3, which provides that a grievance "may be presented for arbitration," to bolster his assertion that arbitration is not mandated by the agreement. This very argument was rejected by the Fifth Circuit in *Deaton Truck Line, Inc. v. Local Union 612, International Brotherhood of Teamsters, 314 F.2d 418 (5th Cir. 1962).* The term "may" in this context is construed to grant the claimant permission to abandon his complaint. However, if he chooses to pursue it, his exclusive remedy is through the procedures provided in the agreement.

Clearly, Daigle's suit is a "classic hybrid S 301 action." Since the six-month statute of limitations governing the representation claim has expired, the contract claim against Gulf States cannot survive. The judgement of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

AMBROSE DAIGLE

vs. CIVIL ACTION NUMBER B-83-704-CA

GULF STATES UTILITIES COMPANY, ET. AL.

MEMORANDUM OPINION AND ORDER

This case is before the Court on defendant Gulf States Utilities Company's motion to dismiss Plaintiff's remaining cause of action after remand by the United States Court of Appeals for the Fifth Circuit. Plaintiff, Ambrose Daigle, originally filed suit against multiple defendants, including Gulf States Utilities Company, and all causes of action were dismissed by United States Magistrate Earl S. Hines. Plaintiff appealed that decision. The Fifth Circuit affirmed the dismissal except for one claim which was remanded with instructions for further consideration. *Daigle v. Gulf States Utilities Company, Local Union Number 2286, 794 F.2d 974 (5th Cir. 1986)*, cert. denied, ___U.S.___, 107 S.Ct. 648 (1986).

Plaintiff's suit against Gulf States Utilities Company arises from his discharge as an employee of that business for violation of company work rule. Because the discharge occured more than six months prior to the filing of this lawsuit, Magistrate Hines dismissed that action as barred by the six month statute of limitations imposed by S 301 of the Labor Management Relations Act (L.M.R.A.) and *DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).* In reviewing Magistrate Hines' decision, the Fifth Circuit explained that in order for the L.M.R.A.'s six month statute of limitations to apply in this case, Plaintiff's claim must be characterized as "a classic hybrid S 301 claim of employer breach of contract and union breach of the duty of fair representation." Daigle, 794 F.2d at 977. In other words, if Plaintiff's claim against G.S.U. is a

"classic hybrid S-301," his case must be dismissed for failure to comply with the six month statute of limitations. If, on the other hand, Plaintiff's claim is a straight forward breach of contract case, the four year statute of limitations under Texas law would apply. Plaintiff's cause of action would remain viable. *Daigle, 794 F.2d at 977.*

A "classic hybrid S 301" claim arises in situations in which the collective bargaining agreement provides for the final and binding settlement of grievance through private, out of court, dispute settlement procedures. The claimant challenges two things: 1) that the discharge from employment by the company is contrary to the terms of the contract itself, and 2) that the Union failed in its duty to adequately represent the claimant during the grievance proceedings pursuant to the contract. Both elements must be raised by the plaintiff, because otherwise the parties are bound by the results of the private settlement process as to the discharge itself. *DelCostello, 462 U.S. at 166, 103 S.Ct. at 2291.* If the private settlement procedures of the collective bargaining agreement are not binding and final on the parties, then the claim is simply one of breach of contract and may be brought separately from any claim against the Union. *Vaca v. Sipes, 386 U.S. 171, 183, 87 S.Ct. 903, 913, 17 L.Ed.2d 842 (1967).*

The Fifth Circuit was unable to make that determination in this case because the collective bargaining agreement was not in the record on appeal. The case was remanded with instructions to review the collective bargaining agreement to determine which statute of limitations would apply based on the language of the agreement itself. Specificly, the Fifth Circuit instructed that:

> "If the contract contains the typical provision that aggrieved parties must go through the grievance and arbitration procedures and the procedures' resolution is final and binding on the parties, appellant's suit against both employer and union is barred . . . Only if the arbitration and grievance procedures in the contract are alternative procedures, leaving the aggrieved employee and the exclusive bargaining representative free to use or not use them as they wish does the state

> statute of limitations for breach of contract apply to appellant's S 301 suit." *Daigle,* 794 F.2d at 978.

The issue presently before this Court is one of interpretation of the provisions of the contract between the parties.[1] A hearing was conducted on September 16, 1987, at which time the collective bargaining agreement was introduced as an exhibit. Plaintiff takes the position that the language of that agreement does not specify that the parties are required to participate in binding grievance and arbitration procedures, but that instead it leaves those options to the discretion of the parties. However, the language of the collective bargaining agreement itself indicates otherwise. A careful examination of the document demonstrates that Plaintiff's claim must be the "classic hybrid S 301" type that is controlled by the six month statute of limitations.

The collective bargaining agreement is divided into articles covering various subjects, and Article VI is entitled "Adjustment of Grievances." Section 2 of Article VI sets out in detail the steps required to be followed by the employees, union and employer, G.S.U., in processing grievances. The prefatory language of that section makes it clear that the procedures outlined therein are mandatory and exclusive:

> "All such grievances must be processed solely in accordance with the following procedure ..." Article VI, Section 2, Collective Bargaining Agreement. (emphasis added)

The required mechanism for handling grievances, including "[d]isciplinary layoff and discharge grievance,"[2] are then described in the remainder of Section 2.

---

1. Subsequent to remand, this case was transferred to Magistrate J. Michael Bradford for all further proceedings.

2. Article VI, Section 4 provides: "Discplinary layoff and discharge grievances shall first be presented at step 2." That same Section provides that the company will notify a Union representative of any "employee's discharge" within five days of the action.

In summary, the grievance process is composed of three "steps" that provide various time periods for notice of the problem to company representatives and additional time periods to attempt to resolve the dispute. The first step involves notification of the employee's supervisor with an attempt at informal settlement. If that fails to end the matter, a second step provides for notice to a "department head" with a subsequent formal hearing. If the dispute is still not resolved, the third step calls for notice to the company president who is given a final time period to respond to the complaint.

Article VI, Section 5 states clearly that failure to follow the above described steps in processing grievances will result in the waiver of any claims:

> "Any grievance not presented or thereafter processed within the prescribed time limits specified above will be deemed to no longer exist." Article VI, Section 5.

Contrary to Plaintiff's assertions, the grievance procedures are not optional with the parties. Instead, they are mandatory and exclusive steps in handling complaints such as disciplinary discharge.

The collective bargaining agreement provides an additional method for processing the grievance if the matter is still not settled after completion of the above described procedures. Article VII provides for arbitration of diputes within 30 days of the completion of the third step of the grievance process. Section 4(b) of Article VII provides that the "decision of the arbitrator shall be in writing, binding the parties . . . " (emphasis added).

Plaintiff contends that the arbitration described in Article VII is optional rather than mandatory for two reasons. First, Plaintiff points to the language in Section 3 of Article VII that provides that a "grievance may be presented for arbitration within thirty days from the date of the third step answer . . . " (emphasis added). Plaintiff argues that use of the word "may" renders the arbitration permissive rather than mandatory. The courts have uniformly held, however, that the use

of the word "may" in the context of arbitration in collective bargaining agreements such as this one is a mandatory term rather than a permissive one. This precise question was addressed by the Fifth Circuit in *Deaton Truck Line, Inc. v Local Union 612, International Brotherhood of Teamsters, 314 F.2d 418 (5th Cir. 1962),* as follows:

> "Appellant argues that the use of the word 'may' in the contract prevents arbitration from being compulsory or obligatory. Clearly, however, 'may' should be construed to give either aggrieved party the option to require arbitration." Id. at 422 (citations omitted).

See also, *Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614 (1965); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343 (1960); Local 771, I.A.T.S.E., v. R.K.O. General, Inc., 546 F.2d 1107 (2nd Cir. 1977); Ceres Marine Terminals, Inc. v. International Longshoremen's Assoc. Local 1969, 683 F.2d 242 (7th Cir. 1982); Bonnot v. Congress of Independent Unions Local #14, 331 F.2d 355 (8th Cir, 1964).*

Plaintiff also argues that the language of the third paragraph of Article VII, Section 1 should be read to make arbitration optional rather than mandatory. That paragraph states that "[a]ny questions of arbitrability on any issue may be determined by a court and not by the arbitrator (emphasis added)." However, that language pertains to a completely different matter. Article VII, Section 1 provides a list of specific issues that "shall not be subject to arbitration . . . " The above language relied on by Plaintiff simply states that controversies concerning which issues are subject to arbitration will be settled by the courts. That language in no way indicates that arbitration itself is optional rather than mandatory, Further, it is clear from the language of Section 1 that the disciplinary discharge of employees is not excluded as an issue for arbitration, and Plaintiff does not make that argument.

The collective bargaining agreement in this case does contain the "typical provision" described by the Fifth Circuit that requires the parties to submit to binding grievance and

arbitration procedures. Plaintiff's claim is therefore the "classic hybrid S 301" type which comes within the six month statute of limitations.

Plaintiff makes several additional arguments about the right to proceed with court action without the need of exhausting arbitration procedures as a prerequisite to filing suit. Whether or not those fact situations apply to this case, none of the exceptions relied on by Plaintiff alters the statute of limitations of six months for bringing suit against the company.

It is therefore ORDERED that Plaintiff Ambrose Daigle's complaint is hereby DISMISSED for this reason stated in this OPINION and ORDER.

RENDERED and SIGNED this 5th day of November, 1987.

J. MICHAEL BRADFORD
UNITED STATES MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-6252

AMBROSE DAIGLE,
Plaintiff-Appellant,

v.

GULF STATES UTILITIES COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING
(November 17, 1988)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

CHIEF JUDGE

APPENDIX B

STATUTES INVOLVED

29 USCA 160 (b) Prevention of unfair labor practices-- Powers of Board generally

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or member hereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occuring more than six months prior to the filing of the change by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.